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No. 97-767

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1997

CASE CORPORATION, *Petitioner*,

v.

DANIEL FREEMAN, *Respondent*.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8, petitioner respectfully draws to this Court's attention certain aspects of its recent decision in *General Electric* v. *Joiner*, No. 96-188, issued on December 15, 1997, that bear on the questions presented in the instant petition.

1. In *Joiner*, this Court explained that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." Slip op. 9. For that reason, a district court may appropriately exercise its discretion to exclude expert scientific testimony after concluding that "there is simply too great an analytical gap between the data and the opinion proffered." *Ibid.* This type of inquiry, however, is still foreclosed in the area of *applied* science (such as engineering) by the decision below, which squarely held that an expert who invokes his "experience" or "training" — and disclaims reliance on any "technique" or "methodology" of his or her professional discipline — can avoid scrutiny under *Daubert* altogether. And the Fourth Circuit is not alone: the Second, Ninth, and Tenth Circuits have all adopted a similar approach. See Pet. 17-21. Of course, when *Daubert* is thereby bypassed, the district court has no opportunity, in undertaking a preliminary "gatekeeping" assessment of the admissibility of proffered expert testimony, to ascertain whether "the studies upon which the experts relied" are "sufficient, whether individually or in combination, to support their conclusions." *Joiner*, slip op. at 9.

As this case illustrates, the approach of the Fourth Circuit is fundamentally at odds with *Joiner*.[1] The total absence of any logical connection between the "testing" and literature review performed by plaintiff's sole expert, Smith Reed, to his opinions on the purported design defect at issue here meant that his testimony was nothing more than a restatement of an untested hypothesis. See Pet. 3-4, 18-19, 24-25, 29. Expressed in the terms used by this Court in *Joiner*, the judgment below rested entirely on no more than the expert's "*ipse dixit*." *Joiner*, slip op. 9. *Joiner* clearly establishes that scientific testimony of this sort may be excluded.[2]

We believe that *Joiner* reveals the Fourth Circuit's error on the first question presented. After *Joiner*, the notion that an expert relying on "experience" and "training" may render conclusions without supplying an explanation of the reasoning and methodology supporting those conclusions is simply untenable. Nevertheless, it is likely that some courts of appeals will persist in the mistaken view that *Daubert* (and *Joiner*) have no applicability to "applied" scientific testimony. For that reason, if the Court declines simply to grant, vacate, and

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[1] The *Joiner* Court's first holding — that "abuse of discretion is the proper standard by which to review a district court's decision to admit or exclude scientific evidence," slip op. at 9 — has no bearing on the issues presented in this petition, both of which are questions of law as to which no deference is given to either the district court or the court of appeals. See, *e.g.*, *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 402 (1990) (rulings based on legal error necessarily constitute abuse of discretion).

[2] Reed's testimony, in fact, would not even have been admissible under the "weight of the evidence" methodology discussed in Justice Stevens's opinion. See slip op. 3-5 (Stevens, J., concurring in part and dissenting in part).

remand in light of *Joiner*, it should grant plenary review to resolve the clear conflict in the circuits (see Pet. 13-16) over whether *Daubert* applies to applied science testimony and if so, how.

2. Whether the district court has a gatekeeping function in areas outside of purely scientific testimony — and, in particular, in the applied science context — arises in countless cases every year. As Justice Breyer observed in his concurring opinion, "cases presenting significant *science-related* issues have increased in number" in recent years, placing new demands upon district judges charged with "making determinations about complicated scientific *or otherwise technical* evidence." *Joiner*, slip op. 2-3 (Breyer, J., concurring) (emphasis added). Indeed, the examples cited by Justice Breyer, including "[e]conomic, statistical, technological, and natural and social scientific data," *id.* at 3, illustrate the broad range of "science-related issues" that arise in litigation, of which engineering testimony is one of the most common. As we demonstrated (Pet. 13-16), six circuits apply this Court's teachings in *Daubert* (and presumably will apply *Joiner* as well) in dealing with these issues. In sharp contrast, the Second, Fourth, Ninth, and Tenth Circuits, have refused to apply *Daubert* in resolving certain recurring questions in the applied science context and in other areas of expert testimony. Given the significance of this question and the clear, well-developed, and intractable circuit split, this Court's review is plainly warranted.

3. This Court's decision in *Joiner* expressly recognized that "conclusions and methodology are not entirely distinct from one another," and that a district court, in making its threshold admissibility decision, may examine whether the "experts' opinions were sufficiently supported by the [data] on which they

purported to rely." Slip op. 7, 9.[3] However, like the Eleventh Circuit in *Joiner*, the Fourth Circuit held (in contrast to the approach of several other circuits) that a challenge to an expert's reasoning and analysis presented a jury question relating to the weight of the expert's "conclusions," rather than an admissibility question. See Pet. App. 9a n.6, 11a; see also Pet. 24-30; Pet. Reply 10. *Joiner* thus effectively answers the second question presented in the petition in Case's favor.

Nevertheless, in conjunction with deciding whether *Daubert* applies to testimony concerning the application of scientific knowledge, this case presents an opportunity for the Court to elaborate on the district court's role in analyzing the link between an expert's conclusions and data upon which they rest. For example, although *Joiner* makes clear that a district court does not abuse its discretion in excluding the testimony of experts who fail to supply reasons for their conclusions, slip op. 9, it does not address whether courts should routinely *require* an explanation when experts "extrapolate from existing data." *Ibid.* Additional guidance from this Court on that important subject would be of great assistance to the lower courts.

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[3] Indeed, Case cited the Eleventh Circuit's opinion in *Joiner* as reflecting the same misguided approach as the Fourth Circuit below in regard to the purported ironclad distinction between methodology and conclusions. See Pet. 25-26; Pet. Reply 10.

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, the Court should grant the petition, vacate the judgment of the Fourth Circuit, and remand this case for further proceedings in light of *Joiner*.

Respectfully submitted.

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